does not conflict with the other state and federal court decisions cited by petitioners.

Indeed, even the decision in *Scheiner*—where the flat tax *was* imposed on interstate commerce—did not rely solely on the "structure" of the tax. Rather, this Court explained, "Although out-of-state and in-state vehicles subject to the axle tax traveled approximately the same number of miles on Pennsylvania's highways, less than one-sixth of the State's total axle tax revenues were generated by Pennsylvania-based vehicles." *Scheiner*, 483 U.S. at 277. On that basis, this Court found discrimination: "[S]ince they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Id.* at 286. Thus, it was *because of* that 500 percent disparity that the taxes were "plainly discriminatory."

And if *Scheiner* itself had not been clear that actual evidence was crucial to the decision, this Court's recent opinion in *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 125 S. Ct. 2419 (2005) ("*ATA v. Michigan*"), resolves the question. There, this Court summarized *Scheiner*, explaining in particular the record evidence of the 500 percent tax disparity between local and interstate carriers. *Id.* at 2425. After noting the lack of similar evidence that the Michigan tax had discriminatory effects, this Court concluded, "Consequently, we lack any reason to infer that Michigan's lump-sum levy erects, as in *Scheiner*, an impermissible discriminatory road block." *Id.*

No decision of this Court, properly understood, mandates that petitioners should have been entitled to prevail on their claim of discriminatory effects without the need to provide evidentiary support for those alleged effects. Similarly, none of the state court and circuit court decisions cited by petitioners is in conflict with the Oregon Supreme Court's decision in this case.

In short, no case has held that a taxpayer is entitled to a conclusive presumption of discriminatory effects suffered as a result of an optional tax, particularly one paid only by others. Instead, where, as here, an attenuated chain of causation is relied upon in support of alleged discrimination, courts have required evidence, as this Court did in *ATA v. Michigan*.[5] There is nothing untoward in the Oregon Supreme Court's holding to that effect.

II. The Oregon Supreme Court's consideration of the evidence was sound and unremarkable.

Petitioners ask this court to grant *certiorari* to review the Oregon Supreme Court's factual determinations. Those determinations—findings of a failure of proof by petitioners—were proper in the circumstances, and in any event would not merit United States Supreme Court review.

Analysis of the evidence will be facilitated by a brief discussion of the broader legal context. This Court's

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[5] Insofar as petitioners suggest a concern that lower courts may give *ATA v. Michigan* an overly broad reading, this Court should allow that decision to percolate in the lower courts before revisiting its ruling.

dormant Commerce Clause tax cases inquire first whether the challenged tax is discriminatory, or whether the tax instead imposes only incidental effects on interstate commerce. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). If the tax is discriminatory, then it is subject to strict scrutiny. *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 647 (1995).

Discrimination exists when a tax constitutes "economic protectionism" based on "either discriminatory purpose or discriminatory effects." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Discriminatory purpose can be found most readily based on facial discrimination. *See, e.g., Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564 (1997) (striking down property tax exemption expressly available only to charitable institutions principally serving state residents). A court may also find discriminatory purpose based on evidence of actual protectionist legislative intent, as was the case in *Bacchus*.

Finally, as stated in *Bacchus*, discrimination may be found based on evidence of such a disparate effect on interstate commerce that the burden cannot be viewed as incidental. Thus, in *Scheiner*, this Court was unwilling to conclude that the 500 percent discrepancy between the effective tax rate for in-state and out-of-state truckers was incidental. Instead, this Court inferred discrimination, and applied strict scrutiny.

Undisputedly, this case presents no issue of facial or intentional discrimination. Petitioners also do not argue that the flat fees are unconstitutional, if any alleged burden on commerce is deemed incidental. Petitioners do

contend, however, that the Oregon Supreme Court was obliged, on this record, to find that the challenged tax has such a disparate effect on interstate commerce that discrimination must be inferred. The Oregon Supreme Court's rejection of that contention stands on firm ground.

As discussed above, the trial court in this case found no evidence of businesses concentrating operations in Oregon to "take advantage" of the flat-fee options. Pet. Cert. 56a–57a. To the contrary, given "the small size" of any tax advantage, and "the uncertainty of actually achieving a tax benefit," the trial court found it "unlikely that the flat-fee option changes business decisions of truckers." Pet. Cert. 58a. The trial court concluded, "[E]vidence that would indicate that interstate commerce has been damaged was completely lacking." Pet. Cert. 69a. Those findings, affirmed by the Oregon Supreme Court, undeniably are supported by the record.

Moreover, with respect to the alleged tax advantage accorded flat-fee taxpayers, petitioners' argument and evidence suffer from several critical flaws. Petitioners would analogize this case to *Scheiner*, where this Court struck down a tax that did not in any way attempt to approximate a fair charge for the services provided, and which in fact charged out-of-state carriers an effective rate 500 percent greater than their in-state counterparts.

But in this case, the challenged tax *does* attempt to approximate a fair charge. The flat-fee rates are set at a level designed to assess from each category of flat-fee taxpayers the same tax that the group would have paid if it had paid the apportioned weight-mile tax. *ATA v. Ore-*

gon, 124 P.3d at 1213. Moreover, as discussed above, the flat fees are carefully monitored to ensure revenue-neutrality within a relatively narrow tolerance and, in the worst cases, the Legislative Assembly misses the mark by about 15 percent.[6]

The constitution does not require precision of state taxes. *See, e.g., Amerada Hess Corp. v. N.J. Taxation Div.*, 490 U.S. 66, 74–75 (1989). The marginal discrepancy in this case from perfectly equal taxation is within a magnitude that has been approved in this Court's dormant Commerce Clause jurisprudence. *See, e.g., Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 184 (1983) (refusing to strike down tax under "external consistency" analysis based on 14 percent dis-

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[6] The trial court found that petitioners seek to "exaggerate the difference" in effective tax rates, and that they "fail to mention" that flat-fee taxpayers sometimes pay more than they would under the weight-mile tax. Pet. Cert. 68a. To support their "exaggerated" view of the difference, petitioners continue to cite their own trial exhibit 82. *See* Pet. Cert. 5 (citing the exhibit as "E.R. 25," which references the excerpt of record in the Oregon appellate courts). But that exhibit, as well as virtually all of petitioners' other evidence of relative tax rates, was admitted through the testimony of their lead witness, Robert Russell. See Trial Transcript at 199-200. In a finding that was not challenged on appeal, the trial court "disregard[ed] Mr. Russell's testimony in its entirety," because he demonstrated "at best, * * * a reckless disregard for the accuracy of the information he presented to the court, and, at worst, he deliberately attempted to deceive the court." Pet. Cert. 50a-60a. Thus, petitioners' continued reliance on evidence admitted through Mr. Russell is misplaced.

crepancy). Properly viewed, the evidence in this case does not support petitioners' claim of discrimination. The Oregon Supreme Court correctly so held and, in any event, that court's assessment of the record evidence in this case is not of sufficient moment to warrant this Court's attention.

Moreover, petitioners improperly rely on cases noting that any degree of discrimination is intolerable. Of course, once "discrimination" is found—for example, where a tax is facially discriminatory—there is no "*de minimus*" defense. But that does not mean, as petitioners suggest, that every disparate effect leads ineluctably to a conclusion of discrimination. If that were so, it would vitiate the entire body of law dealing with incidental burdens on commence. The Oregon Supreme Court's unremarkable rejection of that argument also does not warrant review.

III. The challenged tax raises no issues of "internal consistency."

Finally, petitioners ask this court to grant review to consider whether the challenged tax violates the internal-consistency principle. But the version of internal consistency that petitioners advance is supported by no case of this Court, of any circuit court, or of the highest court of any State.

Petitioners again principally rely on *Scheiner*. But in *Scheiner*, this Court explained that the generally applicable flat tax in that case operated as an entry fee for carriers wishing to do business in the State. *See Scheiner*, 483 U.S. at 294 (if each state charged a flat tax for the privilege to make "commercial entrances" into the state,

commerce among the states would be deterred). That flat tax failed the internal-consistency test, because if every state adopted an identical entry fee, then an interstate carrier inevitably would have to pay more than one fee, while an intrastate carrier would have to pay only one. The tax *inherently* subjected interstate truckers to multiple taxation.

The optional flat fees in this case suffer from no such infirmity. They do not operate as entry fees. An interstate carrier may elect instead to pay the perfectly apportioned weight-mile tax. Thus, *Scheiner* readily is distinguishable and is not inconsistent with the Oregon Supreme Court's decision.

Essentially, petitioners' version of internal consistency would establish a hair-trigger nondiscrimination requirement. Under petitioners' view, a tax would fail internal consistency if any circumstance could be hypothesized in which interstate commerce would bear a heavier burden under the tax on account of its interstate character.

But this Court's precedents are clear that a tax does not violate internal consistency merely because it may burden interstate commerce more heavily in specific hypothetical circumstances. Rather, internal consistency is concerned with taxes that *inherently* burden interstate commerce more heavily. Internal consistency is a theoretical exercise, in which one considers the text ("the face") of the challenged statute, subjecting it hypothetically to universal adoption. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). Internal consistency looks "to the structure of the tax" and "asks nothing about the degree

of economic reality reflected by the tax." *Oklahoma Tax Comm. v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

As Professor Hellerstein has explained, the internal-consistency test identifies taxes that "will inevitably subject a multistate enterprise to multiple taxation." Hellerstein, *Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 140 (1988). The test exposes "intrinsically unfair" state taxes. *Id.* at 141.

Thus, the internal-consistency test does not ask how the tax would affect tax liabilities under specific hypothesized facts. Indeed, it would be a strange legal doctrine that precluded reliance on specific evidentiary facts in favor of specific hypothetical ones. No case of this Court, of any circuit court, or of any state supreme court, conflicts with the Oregon Supreme Court's rejection of petitioners' proposed form of internal-consistency analysis.[7]

Furthermore, petitioner American Trucking Associations (ATA) recently endorsed a form of tax similar to Oregon's flat-fee options in its *ATA v. Michigan* briefing.

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[7] Petitioners' contention also is belied by this Court's external consistency jurisprudence. Those cases frequently address claims by interstate business entities that, in the specific circumstances, a state tax unfairly burdens them. As *Container Corp.*, discussed above, demonstrates, those cases do not consider every disparate burden fatal to the challenged tax. The analysis instead tolerates an acceptable "margin of error." *Container Corp.*, 463 U.S. at 184.

In that case, Michigan explained the broad array of routine flat fees that might be vulnerable on ATA's view of the applicable standards. ATA sought to defuse that argument, explaining that States still could assess flat fees in appropriately measured ways:

> Nothing would prevent a state from imposing a flat fee on taxpayers who confine their activities to the taxing jurisdiction; the state simply would have to provide a constitutional "out" for those taxpayers who operate in multiple states. For example, *such an out could take the form of apportionment of the tax*.

ATA v. Michigan, Petitioners' Reply Brief on the Merits at 13–14 (emphasis added).

Oregon's flat-fee options are an improvement even on the "out" suggested by ATA. Oregon's flat fees are available universally to anyone who would elect them, not restricted to those who confine their activities to Oregon. Just as ATA's hypothetical tax admittedly would not offend the internal-consistency requirement, so too Oregon's flat-fee options readily pass muster under that test, properly understood. Petitioners' contrary argument is not worthy of this Court's review.

IV. The challenged tax appears to be unique.

Petitioners contend that a decision in this case could settle the validity of numerous "flat" state assessments on interstate commerce. But again, the flat fees in this case are not *imposed on* interstate commerce. Petitioners cite no other state tax that is similar to the long-standing flat-

fee options at issue here. Because Oregon's flat-fee options are seemingly unique—having evolved as a practical solution to legitimate local concerns—a decision in this case likely would be limited to the facts before the Court.

CONCLUSION

The Oregon Supreme Court fairly evaluated the contentions and the evidence in this case. Its decision is in line with this Court's dormant Commerce Clause jurisprudence, and with the decisions of other state courts and of the federal circuit courts. Moreover, as the trial court opinion observes, the decision in this case resolves only the constitutionality of the tax as implemented in the tax year at issue. If in the future the Oregon Legislative Assembly fails diligently to maintain revenue-neutrality, there will be time enough for an appropriate challenge. For now, the present petition for *certiorari* should be denied.

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL*,

Petitioners,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The question presented in this case – whether the Commerce Clause invalidates a state tax that is structured so that it necessarily benefits domestic and disadvantages interstate businesses – is a recurring one of great importance. The Court has often recognized that such discriminatory levies have baleful effects on interstate trade and the national economy. Yet there is considerable confusion about how courts should approach taxes that have an inherently discriminatory structure. This Court has famously described its "own decisions in this area as a 'quagmire'" (*American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (citations omitted)), an observation that is borne out both by the conflicting rulings below in this case and by the conflict between the Oregon Supreme Court's decision and the holdings of other courts that is described in the petition.

There should be no doubt, however, about the constitutionally problematic nature of the Oregon tax regime at issue here. That conclusion is confirmed by the briefs in opposition: they make no attempt to deny the central assertions in the petition about the inherently discriminatory impact of Oregon's flat tax, while offering arguments in defense of the tax that were *not* accepted by the court below. The aberrant nature of the Oregon Supreme Court's ruling also is graphically demonstrated by the undisputed evidence in this case, which shows that the benefits of the flat tax flow almost exclusively to in-state businesses. Because the Oregon Supreme Court's decision upholding this tax misinterpreted the U.S. Constitution, and did so in a manner that conflicts with decisions of this and other courts, further review is warranted.

A. The Optional Nature Of The Flat Tax Does Not Vitiate Its Inherently Discriminatory Effect

The State defends the flat tax principally by asserting that Oregon's tax regime does not discriminate structurally against interstate commerce – and that empirical proof of discrimination accordingly is necessary if the flat tax is to be challenged – because payment of the flat tax is optional. State Br. in Opp. 5-8; see also AAA Br. in Opp. 6. That argument was not accepted by the court below, which pointedly did *not* rely on the optional nature of the flat tax in rejecting the claim of discrimination and distinguishing *Scheiner*. See Pet. 14. On that, at least, the Oregon Supreme Court was right; the State's distinction is wholly illusory.

The Oregon regime is constitutionally defective because the flat tax provides a discriminatory benefit and corresponding competitive advantage to domestic truckers (or to truckers that concentrate their activities in Oregon), and that benefit is not vitiated in the least by the flat tax's optional nature. There can be no doubt that this is so. As we showed in the petition (at 13-14), trucks that run high mileage in Oregon (which almost invariably are based in Oregon) always will "opt" to pay the flat fee, and therefore will pay Oregon's highway levy at a lower effective rate than trucks that pay the weight-mile tax. That option simply is not available as a practical matter to interstate trucks, because they *never* will run enough miles in Oregon to exceed the break-even mileage.[1] Respondents do not make any response at all to this crucial point. Yet "a state tax that favors in-state business over out-of-state business for no reason other than the

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[1] Interstate trucks would be disadvantaged even if they somehow did exceed the break-even mileage in Oregon because they would have to pay highway taxes to other states in addition to Oregon's flat tax. See Pet. 13-14.

location of its business is prohibited by the Commerce Clause." *Scheiner*, 483 U.S. at 286.[2]

As a fallback, the State argues that *Scheiner* itself requires empirical evidence of a discriminatory effect. State Br. in Opp. 7. We explained in the petition (at 12-13) that this is not a plausible reading of *Scheiner* and is inconsistent with other decisions of this Court, such as *Nippert* v. *City of Richmond*, 327 U.S. 416, 432 (1946), that have not required such evidence when taxes were challenged on the ground that they had a discriminatory structure; the State makes no response. As we also showed in the petition (at 14-17), other state courts of last resort and federal courts of appeals likewise have understood *Scheiner*, as we do, not to require empirical proof of discriminatory effect when a flat tax is challenged. The State does not respond to this point and does not contend that discrimination was proved through empirical evidence in those cases. Finally, the State insists that *American Trucking Associations, Inc.* v. *Michigan Pub. Service Commission*, 125 S. Ct. 2419 (2005), establishes the need for empirical evidence of discrimination when challenging a flat tax. State Br. in Opp. 7-8; see also AAA Br. in Opp. 9-12. We showed in the petition (at 17-19), however, that the *Michigan* decision departed from *Scheiner* because the challenged Michigan tax (unlike the levy invalidated in *Scheiner* and the Oregon flat tax challenged here) fell exclusively on *intrastate* activity. Again, the State makes no response.

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[2] In essence, Oregon is giving high-mileage intrastate carriers the option of paying a lower effective tax rate – an option that is unavailable as a practical matter to interstate carriers. A State could hardly give intrastate companies that do a given volume of business in-state the option of paying their tax at a lower formal rate than applies to companies that perform an equivalent volume of business in other states. But that, essentially, is the nature of the Oregon regime.

B. The Court Below Applied The Wrong Legal Standard In Concluding That The Undisputed Evidence In This Case Does Not Establish Discrimination

The evidence in this case graphically confirms that the Oregon tax regime provides a competitive benefit to domestic businesses. According to the best available data, only about *one-fifth of one per cent* of out-of-state based carriers opt to pay the flat tax; Oregon-based carriers are fifty times more likely to do so. Out-of-state based carriers make up only 3.5 per cent of those electing to pay the flat tax, pay only two per cent of taxes collected under the flat tax, and operate only two per cent of the total miles reported by trucks paying the flat tax. See Pet. 4-5. Even these data greatly overstate the extent to which out-of-state carriers are able to benefit from the flat-tax option: as we showed in the petition (at 5 n.3), almost sixty per cent of the trucks operated in Oregon by out-of-state carriers that pay the flat tax are base-registered *in Oregon*, and therefore have assumed the characteristics of an Oregon-based business. In addition, beneficiaries of the flat tax achieve substantial tax savings, in an amount that increases the profit margin of the typical taxpayer by approximately fifty per cent. See Pet, 6-7.[3] If em-

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[3] Respondents assert that the flat-tax savings were only fifteen per cent of what would have been collected under the weight-mile tax, an amount they label "marginal." State Br. in Opp. 3; AAA Br. in Opp. 4. But that is an aggregate figure; the more any carrier concentrated its activities in Oregon, the greater that carrier's tax saving. Even on an aggregate basis, as we note in text, the courts below found, and it accordingly must be accepted here, that the flat tax saving per mile amounts to approximately *fifty per cent* of the profit margin of the average carrier. See Pet. App. 26a. This is a significant effect by any measure. Similarly, respondent AAA asserts (at Br. in Opp. 5, 8) that out-of-state sand and gravel carriers received a disproportionate share of the flat-tax savings. But this

pirical proof of discrimination is needed, this record surely provides it. Because the briefs in opposition offer a welter of confusing data and discuss evidence that was found unreliable by the trial court (see, *e.g.*, State Br. in Opp. 11; AAA Br. in Opp. 4), it bears emphasis that the evidence cited in the petition and this brief is derived from stipulations and *respondents*' experts, and accordingly is undisputed.

In arguing that this compelling evidence does not establish discrimination, the State complains that the record fails to show that any interstate carriers changed their business practices in reaction to the flat tax. State Br. in Opp. 2-3, 10; see also AAA Br. in Opp. 5, 12-13. But this Court has never insisted on proof that an unconstitutionally discriminatory tax succeeded in altering market behavior; there was no such evidence in *Scheiner*, *Nippert*, or any other case in which the Court invalidated a discriminatory tax under the Commerce Clause. So long as the tax provides a competitive benefit to local business, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 n.15 (1997)), and that is so even if the affected entities "are not deterred from doing a principally interstate business." *Id.* at 578. That must be the rule; Oregon's proposed approach would allow states to provide competitive benefits

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argument, which is not made by the State, is grossly misleading. In total, out-of-state carriers of *all* flat-tax commodities paid only $187,000 out of the $9,266,743 collected under the flat tax, and therefore could have obtained only a tiny fraction of the tax savings. Moreover, a sand and gravel carrier could have obtained any benefit only by concentrating its activities in Oregon, thus yielding to the "hydraulic pressure" of the flat tax. And, of course, if a tax has a structurally discriminatory effect, it is not "saved because some out-of-state carriers which accrue high mileage in [the taxing state] pay the * * * tax at a lower per-mile rate than some [in-state]-based carriers." *Scheiner*, 483 U.S. at 286.

to domestic companies at will so long as they do not exclude the competing interstate businesses altogether.

The State also insists that the flat tax "attempt[s] to approximate a fair charge" because it purportedly is calculated by looking to the mileage traveled by the average truck that travels *only* in Oregon. State Br. in Opp. 10-11. In fact, this feature of the tax is especially *problematic*; by basing its break-even mileage on trucks that operate exclusively in Oregon, the system *guarantees* that it never will be worthwhile for interstate trucks to take advantage of the flat tax – while also assuring that the "free mileage" available to high-mileage trucks accrues only to Oregon carriers and that the economic benefits of the flat tax flow only to carriers that concentrate their activities in the State.[4]

In pointing to the record evidence, we of course do not urge the Court to review the Oregon Supreme Court's factual findings, as the State characterizes our position. See State Br. in Opp. 8, 12; see also AAA Br. 12. To the contrary, assuming that a showing of discriminatory impact is needed here at all, the question – starkly presented in this case – is the *legal* significance under the Commerce Clause of undisputed evidence showing that (1) as a practical matter, a beneficial tax option is available only to in-state businesses and (2) the challenged tax regime provides a lower effective tax rate (and the associated competitive benefits) to those domestic businesses. In ruling this showing inadequate to invalidate the challenged tax, the Oregon Supreme Court adopted an approach that will make it virtually impossible for interstate

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[4] The State suggests that it has periodically adjusted the relative flat-fee and weight-mile rates to make them more equivalent. State Br. in Opp. 1-2 n.1; see also AAA Br. 5-6. In fact, the State's studies consistently showed through the 1990s that payment of the flat fee produced tax savings (see Pl. Ex. 82), and that disparity persisted through the tax year at issue in this litigation.

businesses to establish invalidity of state taxes that have a clearly discriminatory effect.[5] This Court should not allow such a holding to stand.

C. The Decision Below Misunderstands The Commerce Clause Internal Consistency Requirement

The State also misunderstands the import of the Commerce Clause internal consistency test. The State reads *Scheiner* as finding an internal consistency violation because the flat tax there at issue "subjected interstate truckers to multiple taxation" (State Br. in Opp. 13), and asserts that the internal consistency principle comes into play only when the challenged tax (if replicated elsewhere) will subject multistate enterprises to "'multiple taxation.'" *Id.* at 14 (citation omitted). See also AAA Br. 14-15. This assertion is wrong. There is not, and could not have been, any reference to or reliance on multiple taxation in *Scheiner*.[6] And while the internal consistency test doubtless is useful in identifying state

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[5] When rejecting the probative value of this evidence, the Oregon Supreme Court complained that, in showing "the aggregate savings realized under the flat fee," petitioner failed "to break down those figures between in-state and out-of-state trucking operations." Pet. App. 21a. But where out-of-state carriers make up only 3.5 per cent of those paying the flat tax and pay only two per cent of the taxes collected under the flat tax, a comparison between carriers that pay the flat fee and those that do not serves as an almost perfect proxy for a comparison between in- and out-of-state carriers. The state court's contrary conclusion requires a level of precision that simply is not feasible in the real world and will make Commerce Clause challenges impossible to assert.

[6] As we note in the petition (at 18 n.8), the State in *Scheiner* imposed a flat tax for use of its own highways; no other state could have imposed a duplicative tax on the same value. The problem in *Scheiner* was one of structural discrimination, not duplicative taxation.

taxes that are malapportioned, the Court carefully has not phrased the internal consistency principle in terms that are limited to instances of multiple taxation. Instead, the "test * * * simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Oklahoma Tax Commission* v. *Jefferson Lines*, 514 U.S. 175, 185 (1995).

The Oregon tax regime unquestionably has that sort of discriminatory impact. As we showed in the petition (at 23), if all states adopted an identical system, high-mileage carriers that operate exclusively intrastate would obtain unlimited free miles; otherwise identical interstate carriers that travel the same number of miles but do so across state lines either would not reach the break-even point in any one state (and therefore would receive no free miles) or would have to pay flat taxes in many states. Neither the State nor the Oregon Supreme Court denies that this is so. In holding this lack of internal consistency to be immaterial, the decision below accordingly departs from the rule stated by this Court, conflicts with the rulings of other state courts of last resort and federal courts of appeals (see Pet. 26-27), and places interstate businesses at an insuperable disadvantage.[7]

The State also is incorrect in asserting that application of the internal consistency test as it has been articulated by the Court would "establish a hair-trigger nondiscrimination requirement" (State Br. in Opp. 13) or mean that "every disparate effect leads ineluctably to a conclusion of

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[7] The State's assertion that "the internal-consistency test does not ask how the tax would affect tax liabilities under specific hypothesized facts" (State Br. in Opp. 14) is puzzling. As the State itself recognizes, "[]internal consistency is a theoretical exercise." *Id.* at 13. Thus, "[t]his test asks nothing about the degree of economic reality reflected by the tax." *Jefferson Lines*, 514 U.S. at 185.

discrimination." *Id.* at 12. The Oregon tax is constitutionally defective not because it *happens* to fall more heavily on interstate businesses, but because it is structured in such a way that it *necessarily and inevitably* provides a competitive advantage to domestic businesses.[8]

D. How To Address Taxes That Structurally Discriminate Against Interstate Commerce Is A Recurring Question That Warrants This Court's Review

Finally, the State is wrong in contending that review is unnecessary because the Oregon tax is "unique." State Br. in Opp. 15-16. Most of this Court's Commerce Clause cases involved challenges to state taxes that had features every bit as idiosyncratic as those of the Oregon tax regime. See, *e.g.*, *Camps Newfound/Owatonna*; *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996); *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994); *Kraft General Foods, Inc.* v. *Iowa Department of Rev. & Fin.*, 505 U.S. 71 (1992); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 349 (1977). At the most fundamental level, this case involves an issue that recurs frequently in many guises: how to apply the understanding that "'[t]he Commerce Clause forbids discrimination, whether forthright or ingenious.'" *West Lynn Creamery*, 512 U.S. at 201 (citation omitted).

The reality of this case is straightforward. Oregon makes use of a tax regime whose structure necessarily discriminates in favor of in-state businesses. The evidence confirms powerfully that the benefits of the flat tax in fact flow almost exclu-

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[8] The brief filed by petitioner in the *Michigan* litigation, cited at State Br. in Opp. 14-15, is entirely consistent with this view. Petitioner was there referring to state levies on taxpayers who confine their activities to the taxing state; Oregon's tax is of a very different character.